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VIRGINIA RESOLUTIONS.

VIRGINIA—House of Delegates.

Session of 1799—1800.

Report of the Committee to whom were referred the communications of various States, relative to the resolutions of the last General Assembly of this State, concerning the Alien and Sedition Laws:

[Concluded.]

From the review thus taken of the situation of the American colonies prior to their independence; of the effect of this event on their situation; of the nature and import of the Articles of Confederation; of the true meaning of the passage, in the existing Constitution, from which the common law has been deduced; of the difficulties and uncertainties incident to the doctrine; and of its vast consequences in extending the powers of the Federal Government, and in superseding the authority of the State Governments; the Committee feel the utmost confidence in concluding that the common law never was, nor by any fair construction ever can be deemed a law for the American People, as one community; and they indulge the strongest expectation that the same conclusion will finally be drawn by all candid and accurate inquirers into the subject. It is, indeed, distressing to reflect that it should have been made a question whether the Constitution, on the whole face of which is seen so much labour to enumerate and define the several objects of federal power, could intend to introduce in the lump, in an indirect manner, and by a forced construction of a few phrases, the vast and multifarious jurisdiction involved in the common law; a law filling so many ample volumes; a law overspreading the entire field of legislation; and a law that would sweep the foundation of the constitution as a system of limited and specified powers. A severer reproof could not, in the opinion of the Committee, be thrown on the Constitution, on those who framed, or on those who established it, than such a supposition would throw on them.

The argument, then, drawn from the common law, on the ground of its being adopted or recognized by the constitution, being inapplicable to the Sedition Act, the Committee will proceed to examine the other arguments which have been founded on the constitution.

In the British Government, the danger of encroachments on the rights of the people is understood to be confined to the Executive Magistrate. The representatives of the people, in the legislature, are not only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger of the Executive. Hence it is a principle that the Parliament is unlimited in its power; or, in their own language, is omnipotent. Hence, too, all the ramparts for protecting the rights of the people, such as their Magna Charta, their Bill of Rights, &c., are not related against the Parliament, but against the Royal prerogative. They are merely legislative precautions against Executive usurpations. Under such a Government as this, an exemption of the press from previous restraint, by licensers appointed by the King, is all the freedom that can be secured to it.

In the United States, the case is altogether different. The People, not the Government, possess the absolute sovereignty. The legislature, no less than the Executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by the laws paramount to prerogative, but by Constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt, not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also; and this exemption to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws.

The state of the press, therefore, under the common law, cannot, in this point of view, be the standard of its freedom in the United States.

But there is another view under which it may be necessary to consider this subject. It may be alleged that, although the security for the freedom of the press is different in Great Britain and in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by the laws paramount to prerogative, but by Constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt, not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also; and this exemption to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws.

The plain import of this clause is, that Congress shall have all the incidental or instrumental powers necessary and proper for carrying into execution all the express powers; whether they be vested in the government of the United States, more collectively, or in the several departments or officers thereof. It is not a grant of new powers to Congress, but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those otherwise granted are included in the grant.

Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution; if it be not expressed, the next inquiry must be, whether it is properly an incident to an express power, and necessary to its execution. If it be, it may be exercised by Congress. If it be not, Congress cannot exercise it.

Let the question be asked, then, whether the power over the press, exercised in the "Sedition Act," be found among the powers expressly vested in the Congress? This is not pretended.

Is there any express power, for executing which, it is necessary and proper power?

The power which has been selected, as least remote, in answer to this question, is that "of suppressing insurrections," which is said to imply a power to prevent insurrections, by punishing whatever may lead or tend to them. But it surely cannot, with the least plausibility, be said that the regulation of the press, and a punishment of libels, are exercises of a power to suppress insurrections. The most that could be said, would be, that the punishment of libels, if it had the tendency ascribed to it, might prevent the occasion of passing or executing laws necessary and proper for the suppression of insurrections.

Has the Federal Government no power, then, to prevent as to pass resistance to the laws?

They have the power which the constitution

confers most proper in their hands for the purpose.

The Congress has power before it happens to pass laws for punishing it; and the Executive and Judiciary have power to enforce those laws when it happens.

It must be considered by many, and could be shown to the satisfaction of all, that the construction here put on the terms "necessary and proper," is precisely the construction which prevailed during the discussion and ratifications of the constitution. It may be added, and cannot too often be repeated, that it is a construction absolutely necessary to maintain their consistency with the peculiar character of the Government, as possessed of particular and definite powers only; not of the general and indefinite powers vested in ordinary governments. For, if the power to suppress insurrections means a power to punish libels; or if the power to prevent includes a power to prevent, by all the means that may have that tendency, such is the relation and influence among the most remote subjects of legislation, that a power over a very few would carry with it a power over all. And it must be wholly inconsistent either to vindicate the power to be exercised under the name of unlimited powers, or to exceed under the name of unlimited means of carrying into execution limited powers.

This branch of the subject will be closed with a reflection, which must have weight with all; and more especially with those who place peculiar reliance on the judicial exposition of the constitution, as the bulwark provided against undue extensions of the legislative power. If it be understood that the powers implied in the specified powers have an immediate and appropriate relation to them, as means necessary and proper for carrying them into execution, quest is on the constitutionality of laws passed for this purpose. And it would seem that the practice in America must be entitled to much respect. In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strictings of the common law. On this footing the freedom of the press has stood on this foundation, it is yet standing. And it will not be a breach, either of truth or honour, to say, that no person or persons in the habit of more unrestrained malversation in the proceedings and functions of the State Governments, than the persons and presses most zealous in vindicating the Act of Congress for punishing similar malversations on the Government of the United States.

The last remark will not be understood as claiming for the State Governments an immunity greater than they have heretofore enjoyed. Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their baneful growth, than, by pruning them away, deprive the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any one who reflects that to the press alone, compared as it is with abuses, the world is indebted for all the triumphs which have been gained, by reason and humanity, over error and oppression; who reflect that to the same benevolent source the United States owe much of the light which conducted them to the ranks of a free and independent nation, and which have improved their political system into shapes so congenial to their happiness. Had "Sedition Acts," forbidding every publication that might bring the constituted agents into contempt or disrepute, or might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies groaning under a foreign yoke?

In the attempts to vindicate the "Sedition Act," it has been contended, 1. That the "freedom of the press" is to be determined by the meaning of these terms in the common law. 2. That the article supposes the power over the press to be given to Congress, and prohibits them only from abridging the freedom of the press.

Although it will be shown, on examining the second of these positions, that the amendment is a denial to Congress of all power over the press, it may not be useless to make the following observations on the first of them.

It is deemed to be a sound opinion, that the Sedition Act, in its definition of some of the crimes created, is an abridgment of the freedom of publication recognized by principles of the common law.

To these observations one fact will be added, which demonstrates that the common law cannot be drawn by all candid and accurate inquirers into the subject. It is, indeed, distressing to reflect that it should have been made a question whether the Constitution, on the whole face of which is seen so much labour to enumerate and define the several objects of federal power, could intend to introduce in the lump, in an indirect manner, and by a forced construction of a few phrases, the vast and multifarious jurisdiction involved in the common law; a law filling so many ample volumes; a law overspreading the entire field of legislation; and a law that would sweep the foundation of the constitution as a system of limited and specified powers. A severer reproof could not, in the opinion of the Committee, be thrown on the Constitution, on those who framed, or on those who established it, than such a supposition would throw on them.

The argument, then, drawn from the common law, on the ground of its being adopted or recognized by the constitution, being inapplicable to the Sedition Act, the Committee will proceed to examine the other arguments which have been founded on the constitution.

When the Constitution was under the discussion which preceded its ratification, it is well known, that great apprehensions were expressed by many, less the omission of some positive exception from the powers delegated, of certain rights, and of the freedom of the press particularly, might expose them to the danger of being drawn, by construction, within some of the powers vested in Congress; and more especially of the power to make all laws necessary and proper for carrying their other powers into execution. In reply to this objection, it was naturally urged to be a fundamental and characteristic principle of the Constitution, that all powers not given by it were reserved; that no powers were given beyond those enumerated in the Constitution, and such as were really incident to them; that the power over the rights in question, and particularly over the press, was neither among the enumerated powers, nor incident to any of them; and consequently, that an exercise of any such power would be manifest usurpation. It is painful to remark how much the arguments now employed in behalf of the Sedition Act are at variance with the reasoning which then justified the Constitution and invited its ratification.

From this posture of the subject resulted the interesting question, in so many of the conventions, whether the doubts and dangers ascribed to the constitution should be removed by any amendments previous to the ratification, or by postponed, in confidence that, as far as they might be proper, they would be introduced in the form provided by the Constitution. The latter course was adopted; and in most of the States ratifications were followed by propositions and instructions for rendering the Constitution more explicit, and more safe to the rights not meant to be delegated by it. Among those rights, the freedom of the press, in most instances, is particularly and emphatically mentioned. The firm and very pointed manner in which it is asserted in the proceedings of the convention of this State, will be hereafter seen.

In pursuance of the wishes thus expressed, the first Congress that assembled under the Constitution proposed certain amendments, which have since, by the necessary ratifications, been made a part of it; among which amendments is the article containing, among other prohibitions on Congress, an express declaration that they should make no law abridging the freedom of the press.

Without tracing farther the evidence on this subject, it would seem scarcely possible to doubt that no power whatever over the press was supposed to be delegated by the Constitution, as it originally stood, and that the amendment was intended as a positive and absolute reservation of the same.

The committee are not unaware of the difficulty of all general questions which may turn on the proper boundary between the liberty and licentiousness of the press. They will leave it, therefore, to consideration only, how far the difference between the nature of the British Government and the nature of the American Governments, and the practice under the latter, may shew the degree of rigour in the former to be inapplicable to and not obligatory in the latter.

The nature of Governments elective, limited and responsible, in all their branches, may well be supposed to require a greater freedom of amanuensis than might be tolerated by the genius of such a Government as that of Great Britain. In the latter, it is a maxim that the King, an hereditary, not a responsible magistrate, can do no wrong; and that the Legislature, which, in two thirds of its composition, is also hereditary, not responsible, can do what it pleases.

In the United States, the executive magistrate, are not held to be infallible, nor the Legislature to be omnipotent; and both being elective and responsible, it is necessary and proper for the suppression of insurrections.

Has the Federal Government no power, then, to prevent as to pass resistance to the laws?

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The Congress has power before it happens to pass laws for punishing it; and the Executive and Judiciary have power to enforce those laws when it happens.

It must be considered by many, and could be shown to the satisfaction of all, that the construction here put on the terms "necessary and proper," is precisely the construction which prevailed during the discussion and ratifications of the constitution. It may be added, and cannot too often be repeated, that it is a construction absolutely necessary to maintain their consistency with the peculiar character of the Government, as possessed of particular and definite powers only; not of the general and indefinite powers vested in ordinary governments.

For, if the power to suppress insurrections means a power to punish libels; or if the power to prevent includes a power to prevent, by all the means that may have that tendency, such is the relation and influence among the most remote subjects of legislation, that a power over a very few would carry with it a power over all.

And it must be wholly inconsistent either to vindicate the power to be exercised under the name of unlimited powers, or to exceed under the name of unlimited means of carrying into execution limited powers.

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